



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Air and Hydraulic Equipment, Inc.

File: B-250332

Date: January 22, 1993

R. T. LaFollette for the protester.

Troy L. Davis, for DEB Corporation, an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.

Peter A. Iannicelli, Esq. and William T. Woods, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid was properly rejected as nonresponsive where descriptive literature required to be submitted with bids of other than the brand names and models listed in the invitation for bids contained a legend stating that specifications were subject to change and there was nothing in the bid indicating that the legend was not intended to affect the bidder's obligations.

2. A bid that offers to provide the brand names and models listed in the invitation for bids (IFB) and that takes no exception to the IFB's material terms and conditions is responsive because it is an unequivocal offer to provide the exact things called for in the IFB and acceptance of the bid will bind the contractor in accordance with the IFB's material terms and conditions.

DECISION

Air and Hydraulic Equipment, Inc. (AHE) protests the rejection of its bid by the United States Army Corps of Engineers, Nashville District, under invitation for bids (IFB) No. DACW62-92-B-0030 for hydraulic miter gate machinery. AHE contends that the contracting officer improperly rejected AHE's bid as nonresponsive on the basis that descriptive literature submitted with the bid stated that the specifications were subject to change. AHE also contends that it should be awarded the contract because its bid is approximately 20 percent lower than the bid of the

proposed awardee, DEB Corporation. Finally, AHE maintains that DEB's bid also should be considered nonresponsive because literature on some of that firm's offered products contains a similar reservation of the right to change specifications. We deny the protest.

Issued on June 5, 1992, the IFB requested bids for providing four hydraulic power units, four hydraulic cylinders, certain spare equipment, and accessories. Ten bids were received and opened on July 28. AHE's low bid of \$288,750 was rejected as nonresponsive, as was the second-low bid. The Army proposes to award the contract to DEB, the third-low bidder, at a price of \$349,622.07, but is withholding award pending resolution of the protest by our Office.

The IFB listed the major components of the required hydraulic power units and cylinders and set forth their salient characteristics. In the case of certain component parts, the IFB required supplying a particular brand name and model number part or an approved equal. The IFB required bidders to furnish as part of their bids all descriptive material necessary for the contracting officer to determine exactly what equal products, if any, were being offered and the technical acceptability of those products.

AHE's bid indicated that it would provide a number of different types of valves manufactured by Compact Controls, Inc., as components of the hydraulic power units and cylinder assemblies, and the bid included a brochure from that firm as descriptive literature. The contracting officer determined AHE's bid to be nonresponsive because the Compact Controls' brochure stated: "ALL SPECIFICATIONS SUBJECT TO CHANGE."

AHE argues that the "subject to change" language would permit Compact Controls to make changes to its valve specifications only in limited circumstances, such as a misprint or other error. AHE contends that because none of these circumstances exists in the present case, its bid is responsive.

The IFB stated in several places that descriptive literature would be required for bids offering equal products so that the contracting officer could determine what products the bidder would be required to furnish and whether those products would meet the IFB's requirements. The IFB gave ample warning to bidders in two different places that statements in descriptive literature stating that the specifications could be changed would cause a bid to be rejected as nonresponsive. For example, on the first page of Section B, Supplies or Services and Prices/Costs, the IFB stated:

"NOTE TO BIDDER.

"DESCRIPTIVE LITERATURE with statements such as: 'We reserve the right to make changes in specifications, price, or equipment without notice,' are grounds for bids to be considered nonresponsive. (See L.6 52.210-7000 BRAND NAME OR EQUAL Clause.)"

As noted above, the legend on the descriptive literature submitted by AHE to support its offer of other than the brand name/model valves set forth in the IFB stated that the specifications were subject to change. In our view, this language falls squarely within the IFB's warning that submitting descriptive literature containing such a qualifying legend could be a basis for considering a bid nonresponsive. Moreover, we have held that where an agency requires descriptive literature and uses it to determine precisely what the bidder is offering and will be obligated to provide if awarded the contract, any statement in the literature that specifications are subject to change is a material deficiency rendering the bid nonresponsive. See Galaxy Distributing, Inc., B-223535, Oct. 22, 1985, 85-2 CPD ¶ 441; Professional Material Handling Co., B-211733, Oct. 11, 1983, 83-2 CPD ¶ 435.

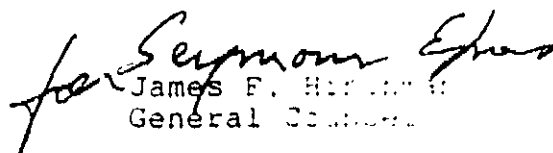
We have held that a bid may be responsive in spite of a qualifying legend contained in descriptive literature where it is reasonably clear from the bid that a "subject to change" legend is not intended to reserve the right to the bidder to change the offered product or to deviate from any of the government's material requirements. Syntrex, Inc., et al., 63 Comp.Gen. 360 (1984), 84-1 CPD ¶ 522; see also Galaxy Distributing, Inc., B-223535, supra. Here, however, AHE's bid contained no indication that AHE intended to meet the exact specifications set out in the IFB in spite of the literature's qualifying legend. Accordingly, the contracting officer properly determined AHE's bid to be nonresponsive.

AHE next argues that the Army should award the contract to it because its bid price is about 20 percent below DEB's bid price. This procurement was conducted using sealed bidding, however, and the IFB stated that award would be made to the lowest responsive and responsible bidder. Once AHE's bid was determined to be nonresponsive, the contracting officer could not legally make award to AHE regardless of any monetary savings that AHE's bid might represent. 10 U.S.C. § 2305(b) (3) (1988).

Finally, AHE argues that if its bid was nonresponsive, the bid submitted by DEB also should be considered nonresponsive. AHE reasons that even though DEB's bid was based upon supplying only the brand names listed in the IFB, DEB was implicitly relying upon manufacturers' descriptive literature that in most instances contains qualifying legends. Thus, AHE concludes that DEB is implicitly reserving to itself the right to change specifications at any time.

We find no merit to this argument. The record shows that DEB's bid took no exception to the IFB's terms and conditions. Furthermore, because DEB was offering the exact brands and models listed in the IFB, there was no requirement that DEB provide descriptive literature, and DEB did not submit any. If awarded this contract, DEB will be obligated to provide the exact items called for in the IFB.

The protest is denied.


James F. Hines
General Counsel